Supreme Court, U.S.
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No. 92-1087

In The

Supreme Court of the United States

October Term, 1992

DARLENE PERELLA, on her own behalf, and all others similarly situated,

Petitioner,

v.

COLONIAL TRANSIT, INC. a/k/a COLONIAL TAXI COMPANY, INC. and MAYFLOWER CONTRACT SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK S. SHIFFMAN*
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
First & Market Building
100 First Avenue
Pittsburgh, PA 15222
(412) 232-0404

JOEL P. KELLY
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
1925 Century Park East
Suite 1150
Los Angeles, California 90067
(310) 203-0200

ANNETTE ESLICK
Senior Attorney
Mayflower Contract Services, Inc.
P.O. Box 7941
Shawnee Mission, Kansas 66207
(913) 345-1986

Counsel for Respondents Colonial Transit, Inc. a/k/a Colonial Taxi Company, Inc. and Mayflower Contract Services, Inc.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTION PRESENTED

Where Petitioner improperly filed this Fair Labor Standards Act lawsuit as a class action under Rule 23 of the Federal Rules of Civil Procedure, and where Respondents specifically asserted as affirmative defenses in the Answer that Petitioner's class allegations failed to state a claim for relief, that "Petitioner could not institute this action on behalf of a class," and that the action was barred by limitations, was the district court correct in ruling that the statute of limitations was not tolled by the filing of the Complaint and that Respondents were not estopped from asserting the limitations defense as to all persons who did not file consents within the limitations period?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.1, Respondents Colonial Transit, Inc. a/k/a Colonial Taxi Company, Inc. and Mayflower Contract Services, Inc. hereby identify the following parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of each corporation:

Parent Company: Mayflower Group, Inc.

Affiliate of Mayflower Contract Services, Inc:

Mayflower Transit, Inc.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Colonial Transit, Inc. a/k/a Colonial Taxi Company, Inc. and Mayflower Contract Services, Inc. hereby submit this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

COUNTERSTATEMENT OF THE CASE

In March 1989, Petitioner Darlene Perella filed this suit in the United States District Court for the Western District of Pennsylvania. Petitioner purported to bring the action on behalf of herself and a class of similarly situated individuals pursuant to Rule 23 of the Federal Rules of Civil Procedure. The complaint sought overtime compensation under the Fair Labor Standards Act.

Respondents Colonial Transit, Inc. and Mayflower Contract Services, Inc. answered the complaint and asserted as affirmative defenses that the complaint failed to state a claim upon which relief could be granted (First Affirmative Defense), that the action was barred by the statute of limitations (Seventh Affirmative Defense), and that Petitioner could not institute this action on behalf of the class (Ninth Affirmative Defense).

After filing suit, Petitioner did virtually nothing to prosecute the class allegations. Petitioner continued to put off class discovery even after the district court, at the status conference held on October 23, 1989, recommended that she "proceed with discovery, at least as to the summary judgment, and I don't see why, at that time you can't do discovery on the class action aspect, too, or anything else that would be relevant to this case, with the idea of finishing up the discovery, at least as far as the motion is concerned, within 60-some days, or something like that." (A-30a).[1]

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[1] References to the Petition for Writ of Certiorari shall be "(Pet. ___)"; references to the Appendix attached to the Petition shall be "(A-___)," followed by the correct page designation.

Indeed, it was not until April 20, 1990, when the district court denied Respondents' motion for summary judgment on the issue of whether the FLSA applied to Petitioner's employment and ordered Petitioner to file a motion for class certification, that she for the first time requested discovery as to potential class members. Up to that time, Petitioner's counsel did not pursue discovery on the class action issues, apparently under the mistaken belief that the opt-in requirements contained in section 16(b) of the Fair Labor Standards Act did not apply to this action.

At the status conference held on June 5, 1990, Respondents' counsel argued that the district court lacked subject matter jurisdiction over Petitioner's class allegations because the suit was improperly filed under Rule 23. Section 16(b) of the FLSA, 29 U.S.C. § 216(b), requires that a class action for overtime pay proceed instead under section 16(b). Unlike Rule 23 class actions in which all similarly situated persons are class members who will be bound by a judgment unless they opt out, section 16(b) expressly provides that no employee shall be a party plaintiff unless he first files a written consent to opt into the action. No written consents were ever filed with the court by any potential class members.

At a subsequent status conference held on October 26, 1990, Respondent's counsel argued that the two-year statute of limitations (set forth in 29 U.S.C. § 255) was running as to potential plaintiffs who had not yet filed written consents, and that the class allegations should be dismissed unless written consents were filed before November 5, 1990. On October 29, 1990, the court ordered

Petitioner to file a motion to proceed pursuant to Rule 23. After allowing full briefing of the issue, the district court *ruled that the two-year statute of limitations applied* to this action, and for any such claims to be timely consents had to have been filed by mid-November, 1990 (A-4a-5a). The district court denied the motion for class certification under Rule 23, and dismissed the claims of the potential opt-in plaintiffs as time barred. (A-6a).

Petitioner appealed to the United States Court of Appeals for the Third Circuit, arguing that the lower court erred in refusing to permit Petitioner to bring this action under Rule 23 and that Respondents were estopped to assert the statute of limitations defense because they failed to disclose to Petitioner's counsel that the statute of limitations was running as to purported class claims. On September 30, 1992, the Court of Appeals issued a Judgment Order, affirming the district court's decision in its entirety. (A-1a). This Petition for Writ of Certiorari followed.

SUMMARY OF RESPONDENTS' ARGUMENT

Petitioner fails to present any cogent argument for granting this discretionary petition. Here, as in the district court and the court of appeals, Petitioner urges that the plain language of section 16(b) of the FLSA concerning the procedure for bringing multiple claimant cases and nearly 20 years of consistent judicial precedent interpreting this provision were swept away in a single Court opinion that does not even touch upon the issue. Petitioner further argues that the statute of limitations was

tolled because Respondents ostensibly "never raised any issue as to the bar of the claims of the potential class members by reason of the statute of limitations." (Pet. 5). In making this argument, Petitioner is forced to ignore Respondents' specific limitations defense, and to attempt to avoid the consequences of her counsel's ignorance of the requirements for proceeding with multiple party actions under FLSA section 16(b) by placing blame alternately on Respondents and the district court.

The district court and the court of appeals each considered and rejected Petitioner's equitable tolling arguments, concluding that Petitioner presented no facts that would justify tolling the statute of limitations as to persons who failed to file written consents within the two-year limitations period. That decision is most certainly correct. The limitations defense was asserted in Respondents' Answer. Yet, Petitioner never advised the district court of the requirements of FLSA section 16(b) as they related to this action, or alerted the court to the need to conduct prompt discovery on class action issues so as to avoid the bar of the statute of limitations. Petitioner's failure to diligently prosecute the class allegations does not support intervention by this Court. The Petition should be summarily denied.

REASONS FOR REFUSAL OF THE WRIT

A. Petitioner's Failure To Diligently Prosecute The Class Action In the District Court Does Not Create A Compelling Reason For Which A Writ Should Issue. The Filing of A Complaint Under the Fair Labor Standards Act Does Not Toll the Statute of Limitations Until Potential Class Members Have Had the Opportunity To File Consents; Hence, The Court Of Appeals Correctly Affirmed The District Court's Decision.

The language of FLSA section 16(b) is directly at odds with the language of Rule 23, which provides that any member of a class action is included unless he or she affirmatively "opts-out." On this basis, courts have uniformly held that FLSA suits cannot be maintained as Rule 23 class actions. *Dolan v. Project Construction Corp.*, 725 F.2d 1263 (10th Cir. 1984); *Kinney Shoe Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288-89 (5th Cir. 1975); *Madrigal v. Green Giant Co.*, 25 Wage & Hour Cas. (BNA) 89, 90 (E.D. Wis. 1981); *Kuhn v. Philadelphia Electric Co.*, 475 F. Supp. 324 (E.D. Pa. 1979); *Lombardi v. Altemose Construction Co.*, 69 F.R.D. 410, 411 (E.D. Pa. 1975); *Groshek v. Babcock and Wilcox Tubular Products Division*, 425 F. Supp. 232, 234 (E.D. Wis. 1977).

Instead, the only collective action available under the FLSA is a so-called "opt-in" class action whereby no party is bound unless he or she files a written consent to join the action with the court. As stated in *Lombardi*,

> [N]o person in an FLSA suit can become a party plaintiff or be bound by a judgment unless he

> has 'opted into' the class, i.e. filed a written consent. . . . "It is *crystal clear* that § 16(b) precludes pure Rule 23 class actions in FLSA suits."

69 F.R.D. at 411 (E.D. Pa. 1975) (emphasis added; citation omitted).

Certainly, the two-year limitations period under the FLSA is not tolled simply because Petitioner improperly filed this suit as a Rule 23 class action. As discussed in *Groshek*, any contrary holding would ignore the express language of Section 16(b):

> The plaintiff argues that the filing of their claim under Rule 23 tolls the statute of limitations pending the determination of the maintainability of the action as a class action. This argument ignores the language of 29 U.S.C. § 256. . . . [¶] [T]he fact that under Rule 23 the filing of the named plaintiff's complaint does toll the statute of limitations in certain actions has no effect on [a § 216(b) suit] where Rule 23 does not apply. *This court has no authority under the FLSA to adopt portions of Rule 23 procedures and apply them to an action brought under the Act* . . . when to do so would be to take the FLSA statute of limitations out of context.

425 F. Supp. at 234 (emphasis added; citations omitted).

Petitioner now acknowledges this authority (Pet. 12), but argues that the express language of FLSA section 16(b) and an established body of case law were overturned by this Court's decision in *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). Petitioner argues that *Hoffmann-LaRoche* mandates

that regardless of her lack of diligence in prosecuting the class allegations and ascertaining the identity of potential class members, this Court should determine whether lower courts are required to intervene in all class actions under FLSA section 16(b) to facilitate notice to potential plaintiffs of a pending lawsuit, and whether limitations should be tolled "until potential class action members have had the opportunity to file consents." (Pet. 7). This argument is meritless.

Hoffmann-LaRoche addressed "the narrow question of whether, in an ADEA action, district courts may play any role in prescribing the terms and conditions of communication from the named plaintiffs to potential members of the class on whose behalf the collective action has been brought." 493 U.S. at 169, 110 S.Ct. at 486. Expressly referring only to ADEA class actions, the Court stressed that the district court's involvement in giving notice to potential plaintiffs is *discretionary*, and should be undertaken only in appropriate cases. *Id.* The Court expressly confirmed only the existence of the trial court's discretion, not the details of its exercise. 493 U.S. at 170, 110 S.Ct. at 486. The Court determined that judicial intervention in the discovery process was appropriate because the named plaintiffs had diligently prosecuted the class allegations, going so far as to seek the names and addresses of the 1200 potential class members even before suit was filed. After obtaining this information, the plaintiffs then sent notices to 600 potential plaintiffs they were able to ascertain, timely filed a complaint and 400 consents, and then moved for discovery of all the names and addresses of similarly situated employees to ensure that all potential plaintiffs would receive notice of the suit. When the

defendant resisted discovery, the plaintiffs then asked the court to intervene to assist them in obtaining and mailing out the remaining notices. *Id.* at 168, 110 S.Ct. at 485.

In the words of Mark Twain, any similarity between the diligence shown by the plaintiff in *Hoffmann-LaRoche* and that shown by Petitioner is that between "lightning and lightning bug." As the transcripts of the status conferences contained in Petitioner's Appendix make clear, Petitioner never once advised the district court of the requirements of FLSA section 16(b) as they applied to this action, or alerted the court to the need to conduct early discovery on class action issues so as to avoid the bar of the statute of limitations. Nor is there any other evidence of record to show that Petitioner exercised diligence in attempting to conduct class action discovery.

Petitioner's contention that her counsel showed "continuous concern with addressing class action issues throughout the status conferences" (Pet. 9-10) finds no support in the record.[2] Petitioner's counsel's failure to timely raise these issues had nothing to do with any statements of Respondents' counsel or the district court's

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[2] One searches the record in vain for any discussion about sending notice to potential class members at the October 1989 status conference. (A-26a-33a). Indeed, at the conference, the district court specifically advised Petitioner to continue discovery on class action issues "or anything else that would be relevant to the case." (A-30a). While Petitioner's counsel did broach the "notice issue" at the April 20, 1990 conference (A-46a) – a full six months before the limitations period expired – he never advised the court that the limitations period was running as to potential plaintiffs or requested the court to intervene in discovery as it related to the class action issues. (A-52a).

failure to set a cutoff date for potential plaintiffs to opt in to the action. Rather, Petitioner's counsel was simply unaware of the opt-in requirements under FLSA section 16(b). As Petitioner's counsel stated at the April 20, 1990 district court hearing, "I thought that [section 16(b)] applied only to the Department of Labor." (A-52a).

B. The Writ Should Be Denied Because Petitioner Cannot Possibly Establish Any Basis For Equitable Tolling Of The FLSA Statute Of Limitations.

Petitioner argues that because she was apparently ignorant of the opt-in requirements of FLSA section 16(b) and failed, for instance, to early-on alert the court to the limitations issue or request the court to hold a discovery conference on the class action issues, the statute of limitations should be tolled because the district court was "under the assumption that no statute of limitations issue existed." (Pet. 9). This argument is wholly unpersuasive. The federal courts uniformly agree that tolling of statutes of limitation is appropriate only in limited circumstances. Thus, for example, in *Kocian v. Getty Refining & Marketing Co.*, 707 F.2d 748 (3d Cir. 1983), the Court of Appeals for the Third Circuit recognized three principal situations where equitable tolling may be appropriate:

> (1) the defendant has actively misled the plaintiff respecting the cause of action, (2) the plaintiff has 'in some extraordinary way' been prevented from asserting his rights, or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

707 F.2d at 753 (citation omitted).

Restrictions on equitable tolling must be scrupulously observed. *Id.* "Statutes of limitation are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy and repose." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452-53 (7th Cir. 1990). Equitable tolling is not an open-ended invitation to the courts to disregard limitations periods simply because they bar what may otherwise be meritorious causes of action. *School District of Allentown v. Marshall*, 657 F.2d 15, 20 (3d Cir. 1981).

Throughout this litigation, the relevant statutory language and case law were freely available to Petitioner and her counsel. Respondents expressly raised the limitations defense at the outset of the litigation, and they were under no duty to educate Petitioner or her counsel concerning the legal principles applicable to this case. The limitations period is not tolled based on her counsel's errors in judgment. *Stallcop v. Kaiser Foundations Hospitals*, 820 F.2d 1044, 1050 (9th Cir. 1987) (because plaintiff was represented by counsel during the limitations period, she "gained the 'means of knowledge' of her rights and can be charged with constructive knowledge of the law's requirements." [*quoting Edwards v. Kaiser Aluminum & Steel Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975)]).

If Petitioner truly believed that the district court was mistaken as to the controlling law, or that the court's management of the case was prejudicing the rights of potential class members, it was incumbent on Petitioner to timely raise the issue with the court. Notably, Respondents pleaded as affirmative defenses both the inappropriateness of Petitioner's class action and the statute

of limitations. Moreover, Respondents went beyond any duty they may have had and affirmatively educated Plaintiff's counsel on the error of his approach. At the June 5, 1990 status conference, counsel for Respondents stated that Rule 23 was the inappropriate vehicle, and that FLSA class actions must proceed under FLSA section 16(b). (A-48a-49a). This was well within the statute of limitations. Petitioner's counsel stated that he thought section 16(b) only applied to suits by the Department of Labor. (A-52a). If there were compelling reasons to address the class action issues early in the litigation, it was the job of *Petitioner* to bring these issues to the attention of the district court – not Respondents.

In no way is this a situation where Petitioner "has been prevented from asserting" her rights. *Burnett v. New York Central R. Co.*, 380 U.S. 424, 429, 85 S.Ct. 1050, 1055, 13 L.Ed.2d 941 (1965). Nothing in *Hoffmann-LaRoche* suggests that an element of a district court's managerial responsibility in actions under section 16(b) includes the obligation to assist a plaintiff in the prosecution of their case.

Petitioner also claims that tolling is required because Respondents were in sole possession of employee lists that she says were necessary to identify potential class members. (Pet. 11-12). Once again, Petitioner presented no fact of record below to support this argument. As in *Hoffmann-LaRoche*, Petitioner could have begun discovery as to the identity of other potential class members prior to or immediately after filing her complaint. Or, she could have filed a complaint in which she named other similarly situated co-workers and thereafter filed consents. However, she did nothing of the sort. In a very real sense,

she slept on her rights, only to be jolted from her slumber when Respondents alerted her in October 1990 that the statute of limitations was running. Petitioner's failure to initiate discovery as to the potential plaintiffs until nearly seventeen months after filing her complaint, and her subsequent delay in sending notices to and obtaining consents from those potential plaintiffs once she had such a list, is convincing evidence of her lack of diligence.[3]

Petitioner's other authorities do not require a contrary result. In *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981), plaintiffs filed an action for overtime compensation under the FLSA. Plaintiff's counsel sent letters to the defendant's current and former employees soliciting their consent to become parties to the suit, and subsequently filed consents obtained from 69 employees who wished to join in the suit. The consents were later determined to be defective because counsel has secured them without leave of court. The court tolled the statute of limitations to allow those employees to file proper consents with the court.

In affirming the district court's order tolling the limitations statute, the Court of Appeals for the Ninth Circuit reasoned that statutes of limitation are designed to

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[3] Moreover, Petitioner neglects to mention that she is now and has for many years been an officer of the union representing Respondents' employees and, as such, easily could have obtained the employee lists from the union. It was exactly this type of diligence by the plaintiff that led the court in *Hoffmann-Laroche* to conclude that court intervention to facilitate notice to potential class members was appropriate. 493 U.S. at 170-71, 110 S.Ct. at 487.

notify defendants of claims before they become stale. The court noted that this purpose had been served because the defendant-employer was notified of the claims of the potential plaintiffs *within the limitations period* when they filed the defective consents. Therefore, requiring the employer to defend those claims would not impose a substantial hardship. 645 F.2d at 761. In sharp contrast, Respondents have been prejudiced because no consents were ever filed in this case and Respondents were never notified of any potential claimants. The potential class members that Petitioner seeks to add to this action are not parties to the suit and have not been identified.

Petitioner's reliance on *Donovan v. Crisostomo*, 689 F.2d 869 (9th Cir. 1982), is equally misplaced. There, the court held that the class action commenced for FLSA purposes when the Secretary of Labor named 24 employees as claimants in a pre-trial order. *Id.* at 875. The action was remanded to allow the district court to determine whether the statute of limitations should be tolled *because the employer failed to assert the limitations issue at trial* and the Secretary may have been misled. *Id.* at 873. Petitioner cannot show that Respondents failed to put her on notice that they would assert the bar of limitations as to all potential plaintiffs who had not filed written consents by mid-November 1990. Indeed, the limitations defense was explicitly raised in the Respondents' Answer and it was never waived. Moreover, the potential class claimants have never been identified.

When all is said and done, Petitioner's arguments in support of equitable tolling boil down to a plea of ignorance of the law. It is well established that Petitioner's ignorance of her legal rights does not toll the statute of

limitations. *School District of Allentown v. Marshall*, 657 F.2d at 21; *Quina v. Owens-Corning Fiberglass Corp.*, 575 F.2d 1115, 1118 (5th Cir. 1978).

In conclusion, Respondents are cognizant of the judicial reluctance to penalize a litigant because of her attorney's error. However, Petitioner must be bound by the acts and omissions of her attorneys.[4] A decision to reinstate this suit merely because of this Court's belief that the Petitioner should not be penalized by the errors of her own voluntarily chosen counsel would be visiting the sins of Petitioner's attorney upon Respondents. "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' " *Link v. Wabash Railroad*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962). For these reasons, Respondents respectfully submit that the petition for writ of certiorari should be denied.

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[4] Indeed, Petitioner expressly alleged in the Complaint that "[t]he attorney's for Plaintiff are experienced and capable in litigation in the field of labor relations." (Complaint, ¶ E).

CONCLUSION

The petition for a writ of certiorari should be denied in its entirety.

Respectfully submitted,

MARK S. SHIFFMAN*
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
First & Market Building
100 First Avenue
Pittsburgh, PA 15222
(412) 232-0404

JOEL P. KELLY
JACKSON, LEWIS, SCHNITZLER & KRUPMAN
1925 Century Park East
Suite 1150
Los Angeles, California 90067
(310) 203-0200

ANNETTE ESLICK
Senior Attorney
Mayflower Contract Services, Inc.
P.O. Box 7941
Shawnee Mission, Kansas 66207
(913) 345-1986

Counsel for Respondents Colonial Transit, Inc. a/k/a Colonial Taxi Company, Inc. and Mayflower Contract Services, Inc.

*Counsel of Record